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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 548

NICK ALFORD AGUILAR,

*Petitioner,*

vs.

THE STATE OF TEXAS,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

OF TEXAS

BRIEF FOR THE PETITIONER

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Opinions Below.

The opinions of the Court of Criminal Appeals of Texas (R. 77; R. 85) are reported at 172 Tex. Crim. 629, 362 S.W.2d 111 (1962).

Jurisdiction

The judgment of the Court of Criminal Appeals of Texas was entered June 20, 1962 (R. 77). A Motion for Rehearing was timely filed on July 3, 1962 (R. 79), and denied October 31, 1962 (R. 85); a Second Motion for Rehearing, timely

filed, was overruled without written opinion on November 28, 1962 (R. 88). The Petition for Writ of Certiorari and Motion for Leave to Appeal *in Forma Pauperis* were filed in this Court on February 25, 1963, docketed as No. 1119 Misc., granted October 14, 1963, and transferred to the appellate docket as No. 548 (R. 90). The jurisdiction of this Court rests on 28 U.S.C. § 1257 (3).

### **Constitutional and Statutory Provisions Involved.**

#### **AMENDMENT FOUR, CONSTITUTION OF THE UNITED STATES**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

#### **AMENDMENT FIVE, CONSTITUTION OF THE UNITED STATES**

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

**AMENDMENT FOURTEEN, CONSTITUTION OF THE  
UNITED STATES**

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

62 STAT. 819 (1948); 18 U.S.C. § 3104; RULE 41 (e)

**FEDERAL RULES OF CRIMINAL PROCEDURE**

**Search and Seizure: (c) Issuance and Contents.**

*"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the*

- place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned." (Emphasis added.)

**ARTICLE 727 a VERNON'S ANNOTATED CODE OF  
CRIMINAL PROCEDURE OF TEXAS**

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted in evidence against the accused on the trial of any criminal case." As amended Acts 1953, 53rd Leg., p. 669, ch. 253, § 1.

**Questions Presented**

1. Is a search warrant, which incorporates an affidavit, stating as its recitation of probable cause:

"... Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law."

unconstitutional and void as not complying with the Constitution and Statutory provisions concerning probable cause, that is, the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and 18 U.S.C. 3104 (Rule 41 (C) Federal Rules of Criminal Procedure)?

2. Is evidence, obtained as a result of a search of a residence under the authority of a search warrant as described in Question One, admissible in a State which by

Statute requires compliance with the Constitution and Laws of the United States as a condition of admissibility!

3. Have the rights of the Petitioner under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States been violated where evidence, obtained as a result of the execution of a search warrant as described in Question One is admitted into evidence in a State Court as described in Question Two?

### **Statement**

#### **A. PROCEDURAL HISTORY OF THE CASE**

The petitioner was indicted for illegal possession of heroin (R. 1). A trial was had on February 29, 1960; in the Criminal District Court of Harris County, Texas and the petitioner was convicted. On appeal to the Court of Criminal Appeals of Texas the conviction was reversed 170 Tex. Crim. 189, 339 S.W. 2d 898 (1960). Upon a new trial the petitioner was again convicted and sentenced to serve twenty years in the State Penitentiary (R. 4, 7). This cause was again appealed to the Court of Criminal Appeals of Texas (R. 7), which court affirmed the conviction on June 20, 1962 (R. 77), 172 Tex. Crim. 629, 362 S.W. 2d 111 (1962). This affirmance was followed by a Motion for Rehearing (R. 79) which was overruled on October 31, 1962 (R. 85), 172 Tex. Crim. 631, 362 S.W. 2d 112 (1962), and a Second Motion for Rehearing which was overruled on November 28, 1962, without written opinion (R. 88).

#### **B. FACTS MATERIAL TO THE QUESTIONS PRESENTED**

On the 8th day of January, 1960, B. J. Rogers and J. J. Strickland, Houston police officers, swore to an affidavit before W. C. Ragan, a Justice of the Peace for Harris

County, Texas (R. 16-21). The affiants stated as sufficient to establish the existence of probable cause for the issuance of the warrant:

"... Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law" (Def. Ex. 1; R. 24, 18-A).

Upon this affidavit, Judge Ragan issued a search warrant for the premises of the petitioner (R. 24-25).

In executing the "warrant", officers Rogers and Strickland announced at petitioner's door that they were police officers and that they had a warrant (R. 15). Upon hearing a commotion within the house, the officers burst into the home (R. 17) and seized the petitioner and evidence which was later used against him (R. 27, 33, 46).

#### C. THE MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED AND TREATED IN THE TRIAL COURT AND THE COURT OF CRIMINAL APPEALS OF TEXAS

##### 1. *In the Trial Court*

During the trial of this cause in the Criminal District Court of Harris County, Texas, the petitioner, through his attorney, repeatedly objected to the introduction of any and all evidence obtained as a result of the execution of the above mentioned "search warrant" (R. 17, 20, 28, 29, 31, 33, 38, 46). This is the only method in Texas courts for objecting to such evidence; pre-trial motions to suppress are not available. *Bailey v. State*, 157 Tex. Crim. 315, 248 S.W. 2d 144, 145 (1952). All of these objections were overruled by the trial judge, exception taken thereto by the petitioner and the evidence admitted (R. 33, 46). These

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objections and exceptions were based upon the petitioner's contention that the evidence was inadmissible since it was obtained in violation of the petitioner's rights under the Constitution of the United States, Amendments Four, Five and Fourteen and Federal Rule of Criminal Procedure, 41 (C), 18 U.S.C. § 3104 (R. 21, 28).

## *2. In the Court of Criminal Appeals*

In the original opinion for affirmance in this cause issued by the Hon. Judge Belcher on June 20, 1962, which opinion was approved by the Court, it was stated that the affidavit aforementioned did in fact recite sufficient facts and information to constitute probable cause for the issuance of the warrant (R. 78). In the opinion on Motion for Rehearing issued by the Hon. Judge Morrison on October 31, 1962, the Court entered into a more thorough discussion of petitioner's contention that the affidavit in question did not state facts sufficient to constitute probable cause:

"Appellant questions the soundness of our prior opinion in which we held the affidavit upon which the search warrant was based to be sufficient. He raised in the trial court and raises here the question of its sufficiency under the Federal Constitution and, more particularly the recent holding of the Supreme Court of the United States in *Mapp v. Ohio*, 367 U.S. 643, 6 L ed 2d 1091; 81 S.Ct. 1684. His contention is that the affidavit is insufficient to comply with our State or Federal Constitution because, after describing the premises sought to be searched, it contained the following recitation:

... is a place where each *have reason to believe and do believe* that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and

contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; *that on or about the 8 day January, A.D. 1960, Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law.*

His primary contention is that the phrases italicized above are not a sufficient statement of probable cause to comply with the Constitution of the United States and of this State" (R. 86, 87).

The petitioner in the Court of Criminal Appeals consistently and continually contended that the above affidavit did not constitute a sufficient recitation of probable cause and cited to that court this Honorable Court's decisions in the cases of *Giordenello v. United States*, 357 U.S. 480 (1958), *Mapp v. Ohio*, 367 U.S. 643 (1961), and many other lower federal and state court decisions which unequivocally hold that such a recitation of probable cause is not sufficient to support the issuance of a search warrant (R. 82, 84).

The Court of Criminal Appeals of Texas held in its decision of October 31, 1962 (R. 85), that Art. 4, Vernon's Annotated Code of Criminal Procedure of Texas, made no other requirement than that "no warrant shall issue without probable cause supported by oath or affirmation" and that probable cause had been shown in the instant cause (R. 87).

**ARGUMENT****I.**

This Honorable Court in the case of *Giordenello v. United States*, 357 U.S. 480 (1958), had before it a situation arising out of a federal arrest warrant; the affidavit which allegedly supported the requirement of probable cause in *Giordenello* was as follows:

"The undersigned complainant (Finley) being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs; to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code." 357 U.S. 480, 481.

The affidavit upon which the search warrant in the instant case relied for its showing of probable cause and which was approved by the Court of Criminal Appeals is as follows:

"... is a place where each have reason to believe and do believe that said party so occupying and using, as a private residence, the said building, house and place has in his possession therein narcotic drugs, as that term is defined by law, and contrary to the provisions of law, and for the purpose of the unlawful sale thereof, and where such narcotic drugs are unlawfully sold; that on or about the 8th day of January, A.D. 1960, Affiant have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

As has been noted, the *Giordenello* affidavit pertained to a federal arrest warrant; the affidavit in this case is a part of a state "search warrant". It is the position of petitioner Aguilar that there is no significant distinction. 357 U.S. at 485. The "Search Warrant" in the instant case is in fact an instrument which contains an affidavit, a warrant authorizing a search, and a warrant of arrest, conditioned upon the successful execution of the search warrant; the Affidavit contained in the instrument must suffice for both warrants. Thus, the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Federal Rules 3, 4 and 41 are brought into interplay in this one instrument denominated a "Search Warrant".

This Court in *Giordenello* stated that:

"The language of the Fourth Amendment, that . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized,' of course applies to arrest as well as search-warrants. See *Ex parte Burford* (U.S.) 3 Cranch 448, 2 L ed 495; *McGrain v. Daugherty*, 273 U.S. 135, 154-157, 71 L ed 580, 584-586, 47 S. Ct. 319, 50 A.L.R. 1." 357 U.S. at 485.

There is much reference in the *Giordenello* opinion to Rules 3 and 4 of the Federal Rules of Criminal Procedure; these rules "implement" the Fourth Amendment as to arrests. *Ibid.*

Rule 41 of the same Rules is the "implementation" of the Fourth Amendment regarding searches and seizures. In particular, Rule 41 (C) requires that the affidavit must satisfy the requirements of probable cause. These Rules then, 3, 4 and 41, do not afford greater substantive rights to the federally accused than the Constitution itself guarantees to every accused. Rather, the Rules "implement" the

basically worded Constitutional provisions so as to allow them to be applied with some degree of practical certainty. A decision, said to be bottomed on these Federal Rules, is, in fact, bottomed on the Constitutional Provisions which they implement because the Rules require no more than the Constitution guarantees.

The affidavit in the instant case (R. 24) stated one fact and one fact only, as distinguished from conclusions, upon which a *JUDICIAL* determination of probable cause could have been made; that fact was that the affiant had received "information" (R. 25). That the information was "reliable" (R. 25) and that it was from a "credible person" (R. 25), these were conclusions, not subject to *JUDICIAL* scrutiny at any time of the issuance of the warrant. The balance of the affidavit is based on the belief of the affiants. The affidavit then, is one based on information and belief, mere hearsay. There is no need to discuss the constitutionality of an affidavit based on hearsay since the affidavit is void on its face. *Ibid.*

In upholding a search and arrest warrant based upon this affidavit, the Court of Criminal Appeals of Texas has allowed the ". . . officer engaged in the often competitive enterprise of ferreting out crime" to usurp the Constitutional duty of the "neutral and detached magistrate." *Johnson v. United States*, 333 U.S. 10, 14 (1948), *Giordenello v. United States*, 357 U.S. at 486 (1958).

This Court further held that the complaint in *Giordenello* could not "pass muster" because it provided no means by which the Commissioner could determine the existence of probable cause. *Ibid.*

In Texas, this usurpation is doubly burdensome since the Court of Criminal Appeals prohibits the accused from at any time challenging an affidavit such as the one herein to determine the falsity of facts stated, provided the affidavit

is regular on its face. *Johnson v. State*, 163 Tex. Crim. 101, 289 S.W.2d 249 (1956); *Hernandez v. State*, 158 Tex. Crim. 296, 255 S.W.2d 219, 5 A.L.R. 2d 394, 398 (1953); *Harkey v. State*, 142 Tex. Crim. 32, 150 S.W.2d 808 (1941). It is thus apparent that since the highest criminal appellate court of Texas refuses a consideration of other than the patent irregularity of the affidavit, this consideration is all-important to the accused in this and similar cases.

It must here be noted that the words "Search Warrant upheld by Judge Hannay" which appear on the warrant (R. 24) are a pencilled notation (best noted in the original record (p. 18-A) or in Exhibit "A" of the Respondent's Brief in Opposition to Petition for Writ of Certiorari) probably placed upon the instrument while it was being used by the United States Government in its prosecution of the petitioner upon the same transaction as this cause in the State Court. The petitioner was acquitted in the Federal District Court by a jury.

The "Judge Hannay" named in the notation is the Honorable Allen B. Hannay, a Federal District Judge sitting in the Southern District of Texas, Houston Division; the same judge who upheld the sufficiency of the affidavit in *United States v. Giordenello*, which was reversed by this Honorable Court in *Giordenello v. United States*, 357 U.S. 480 (1958) for the reason that the affidavit therein did not state probable cause.

No inference should be drawn from said notation that petitioner has been afforded the Constitutionally secured right of *JUDICIAL SCRUTINY* as regards the issuance of the warrant herein at the time it was issued or at any time in the state trial court.

## II.

The Court of Criminal Appeals has so illogically construed *Mapp v. Ohio*, 367 U.S. 643 (1961), that it has circuitously concluded in the instant case that since the state legislature in 1925 enacted a statute (Article 727a, Vernon's Annotated Code of Criminal Procedure) which on its face prohibited the introduction into evidence in a State criminal court of evidence obtained in violation of the Constitution or Laws of the United States, any evidence admitted was automatically Constitutionally admissible (R. 87). In the next sentence the Court states that it:

" . . . has often held that an affidavit identical to the one above (R. 24) constitutes a sufficient recitation of 'probable cause' *Davis v. State*, 165 Tex. Cr. R. 2, 302 S.W.2d 419 (1957). We are aware of no decision of the Supreme Court of the United States holding that such an affidavit is insufficient" (R. 87).

It is thus apparent that the "Constitutional" views of this Court vary widely from those of the Court of Criminal Appeals of Texas. Indeed, the Court of Criminal Appeals does not even mention *Giordenello v. United States*, 357 U.S. 480 (1958), which was repeatedly urged upon it by petitioner. See R. 83.

This Honorable Court has, in many recent and far-reaching opinions clarified the extent to which the Federal Constitutional provisions (here the Fourth and Fifth Amendments) are controlling upon the States through the Fourteenth Amendment. *Bapp v. Ohio*, 367 U.S. 643 (1961); *Marcus v. Search Warrant of Property*, 367 U.S. 717 (1961); *Ker v. California*, — U.S. —, 10 L.Ed.2d 726 (1963).

This Court in its monumental decision in *Mapp* stated:

"Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the *same sanction of exclusion* as is used against the Federal Government." 367 U.S. 643, 655 (emphasis added).

In the

" . . . first case arriving here since our opinion in *Mapp* which would afford suitable opportunity for further exploration of that holding in the light of intervening experience . . . "

this Court in *Ker v. California*, — U.S. —, 10 L.Ed. 2d 726; 733 (1963), explained more fully what is meant by "the same sanction of exclusion as is used against the Federal Government." *Mapp v. Ohio*, 367 U.S. at 655 (1961). This Court held that while the States could enforce practical rules governing arrests and searches and seizures, those rules must " . . . not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain." *Ker v. California*, — U.S. —, 10 L.Ed.2d 738 (1963).

There is nothing more fundamental (as opposed to that area over which the states may exercise some discretion) than the Fourth Amendment's emphatic command that " . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . "

Essential to the protection of this basic Constitutional right is that the existence or lack of probable cause be determined " . . . by a neutral and detached magistrate instead of being judged by the officer engaged in the often

competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). This procedure is specified with particularity in Rules 3, 4 and 41 of the Federal Rules of Criminal Procedure but its inclusion in those Rules does not *a fortiori* place its command within the area of "Supervisory Authority" and thus outside the area of state compulsion. Rather it is clear that Rules 3, 4 and 41, as they require the existence of probable cause in a sworn statement, which statement alone is the basis for a neutral determination of the existence or lack of probable cause, are a very basic and fundamental requirement of the Constitution. The very purpose of the affidavit is to provide a Constitutional standard for the issuance of the Warrant. *Giordenello v. United States*, 357 U.S. at 485 (1958). Therefore, when the affidavit ". . . does not provide any basis . . ." for a judicial determination of the presence or absence of probable cause, it is clearly a void process. *Ibid.* What the Constitution requires is an independent and neutral determination of the element of probable cause as it is evidenced solely by the affidavit. *Id.; United States v. Lefkowitz*, 285 U.S. 452, 464 (1932).

**Conclusion**

For the reasons heretofore stated and so that justice may be done, petitioner prays that this Honorable Court reverse the judgment of the court below, remand this cause to the Court of Criminal Appeals of Texas, and in so doing, fully explain the extent to which the Fourth and Fifth Amendments are controlling upon the several states through the Fourteenth as regards the use by the States of search warrants.

Respectfully submitted,

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